

## **N.D.A.G. Letter to Collins (Nov. 24, 1992)**

November 24, 1992

Mr. Sparb Collins  
Executive Director  
Public Employees Retirement System  
PO Box 1214  
Bismarck, ND 58502

Dear Mr. Collins:

Thank you for your October 9, 1992, letter concerning the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (1992) (ERISA) and the status of the Uniform Group Insurance Program, North Dakota Century Code (N.D.C.C.) ch. 54-52.1 (Program), as a "governmental plan." Specifically, you ask whether nonparticipating local governmental employees could elect to participate in the Program without jeopardizing its status as a "governmental plan." You suggest that the term "employer" could be viewed as the state government and all of its political subdivisions as a means of accommodating the interests of those nonparticipating local governmental employees who desire to become members of the Program.

ERISA was enacted to remedy long-standing abuses and deficiencies in the private pension system. See generally H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. C.C.A.N. 4639. These deficiencies included inadequate vesting provisions, insufficient assets to assure payment of future benefit obligations, and premature termination of under-funded benefit plans. Id.

Although Congress considered whether ERISA should apply to "public" or "governmental" benefit plans, it ultimately decided to exempt such plans from compliance with most ERISA requirements in accordance with Congress' goal of preserving federalism. Roy v. Teachers Ins. and Annuity Ass'n, 878 F.2d 47, 49 (2d Cir. 1989).

Title I of ERISA contains various substantive and procedural requirements with which covered employee benefit plans must comply, including standards for vesting, funding, and fiduciary responsibilities.

An employee benefit plan is exempt from Title I of ERISA if it is a governmental plan. 29 U.S.C. § 1003(b)(1). A "governmental plan" is defined in 29 U.S.C. § 1002(32), which provides, in pertinent part:

The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Thus, a benefit plan is exempt from Title I of ERISA as a governmental plan if it is established or maintained (1) by the government of a state; (2) by a political subdivision of a state; or (3) by an agency or instrumentality of either of the foregoing. Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 915 (2d Cir. 1987), cert. denied, 108 S.Ct. 1112 (1988).

29 U.S.C. § 1002(5) defines "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." 29 U.S.C. § 1002(6) defines "employee" as "any individual employed by an employer."

Because the state of North Dakota would be acting in the interests of the local governmental employer and the covered individuals are local governmental employees, the status of the Program as a governmental plan would continue. In my opinion the definitions of "governmental plan," "employer," and "employee" are sufficiently broad to encompass that arrangement. This interpretation is also consistent with Congress' intent of preserving federalism when it enacted the governmental plan exception.

Because the Department of Labor exercises primary regulatory oversight of pension plans, you may want to refer your inquiry to that agency. If so, please contact:

Robert J. Doyle  
Director of Regulations and Interpretations  
Office of Pension and Welfare Benefit Programs  
U.S. Department of Labor  
Washington, DC 20216  
(202) 523-8971

I trust this addresses your inquiry.

Sincerely,

Nicholas J. Spaeth

dec/jfl